



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 10**

1200 Sixth Avenue  
Seattle, WA 98101

February 20, 2003

Via FAX Transmission  
503-224-6148  
and First Class Mail

Reply To  
Attn Of: ORC-158

Clarence H. Greenwood, Esq.  
Black Helterline  
1900 Fox Tower  
805 Southwest Broadway  
Portland, OR 97205-3359

Re: Robert Kerivan, Howard Pickle and Bridgeview Vineyards, Inc.  
EPA Docket No. CWA-10-2003-0012

Dear Mr. Greenwood:

I regret the delay in responding to your previous correspondence but I wanted to provide a comprehensive response to your letters dated January 15, 2003, and January 20, 2003. I also want to take this opportunity to correct an apparent misunderstanding reflected in Eric Tenbrook's letter dated January 8, 1993, as to any agreements to forgo future enforcement action if Respondents comply with the EPA Compliance Order.

*The January 8, 2003 letter*

EPA Region 10 is pleased that Mr. Kerivan and Bridgeview Vineyards, Inc. are willing to work with EPA to address the unauthorized discharges that occurred on Bridgeview Vineyards property by complying with the November 29, 2002 Compliance Order. However, in his letter dated January 8, 2003, Eric Tenbrook was incorrect in his statement that during our December 17, 2003 meeting, the National Marine Fisheries Service (NMFS) agreed to forgo bringing a separate enforcement action in consideration of Mr. Kerivan's willingness to present EPA with a proposed compliance schedule. It is EPA's recollection that the NOAA Fisheries Service representatives at the meeting agreed that EPA would take the lead in addressing the remedial/restoration work required at the Site through enforcement of the EPA compliance order and that the agencies would work together in reviewing the proposed plan. The NOAA Fisheries representatives indicated during the meeting that they would provide comments on Respondents' proposed restoration plan to Yvonne Vallette at EPA, who would then incorporate those comments in

EPA's response to the plan. I do not recall any agreement made during the meeting to forgo any follow-up enforcement action by NMFS. I do recall, however, that I specifically indicated during the meeting that EPA may bring a follow-up action for penalties even if Mr. Kerivan and his company comply with the EPA compliance order. This essentially reiterates the language contained in paragraph 3.2 of the EPA compliance order which indicates that EPA reserves the right to take enforcement action as authorized by law for any past violation including the violations identified in the compliance order. There was nothing said during the meeting which would preclude NOAA from doing likewise.

*The January 27, 2003 Schedule for Submitting a Restoration Plan*

EPA has reviewed your January 27<sup>th</sup> letter and accepts your proposed date of March 31, 2003, for submitting a proposed restoration plan. However, in reading your letter there appears to be a basic misunderstanding of the purpose for the restoration plan. The primary purpose of the plan is to restore Sucker Creek in the areas impaired by the unauthorized work Respondents conducted in November 2002. EPA is amenable to having some minimal bioengineered bank stabilization techniques incorporated into the restoration design. However, the primary purpose for including any bank stabilization in the restoration plan would be to provide protection of the restoration measures proposed in or along Sucker Creek. EPA's compliance order cannot be used as a means to circumvent the 404 permitting process. Any erosion control solution that proposes to either modify the creek channel or to further harden the stream bank without consideration of aquatic habitat conditions will not be accepted as a restoration measure. Any bank protection activities or structures not allowed by EPA's compliance order would need to be evaluated by the U.S. Army Corps of Engineers (the Corps) under a separate CWA 404 permit application. Following are specific responses to the remaining issues raised in Mr. Kerivan's proposed timetable.

Enclosed with this letter are general guidelines for the preparation of removal and/or restoration plans. You must consider these guidelines when preparing your plan. If an acceptable restoration plan is submitted in a timely manner by Respondents following the guidelines, then EPA should be able to approve the plan for implementation by June 15, 2003.

Because repairs or maintenance can only be performed on authorized structures, EPA recommends that your plan refer to the activities conducted in response to the compliance order as restoration, not as repair or maintenance. To date, none of the structures constructed by Respondents in November 2002 have been authorized under Section 404 of the Clean Water Act.

However, some of the historic riprap along the stream bank may be considered as "grandfathered in" under CWA Section 404 because their placement may predate the CWA (1972). In that regard, some repair or maintenance of this material may be allowed if the repair or maintenance meets the requirements of 33 C.F.R. § 323.4(a)(2). EPA recommends that Respondents consult with EPA or the Corps before initiating any repair or maintenance of this historic material.

Enlargement or augmentation of vegetation in the riparian buffer next to Sucker Creek would provide additional protection for the adjacent agricultural areas and added benefits for salmonids that use the creek for migration and spawning. EPA is supportive of this proposal.

*The CWA 404(f)(1) Exemptions and 404(f)(2) Recapture Provision*

I appreciate the reminder in your January 20 letter of my agreement to respond in writing to the defenses under 33 U.S.C. § 1344(f) [hereinafter referred to as CWA 404(f)] that you raised during our meeting in December. As I indicated during the meeting, I am unwilling to brief the issue for you, but I am willing to provide the following written response clarifying why the CWA 404(f)(1) exemptions do not apply to this case.

First, contrary to the statement in your letter, it is not EPA's position that the CWA 404(f)(1) exemptions do not apply to the facts of this case simply because of the recapture provision in CWA 404(f)(2). Rather, it is EPA's position that the CWA 404(f)(1) exemptions do not apply to this case; but even if the exemptions did apply, because the unauthorized discharges converted parts of Sucker Creek into a use to which it was not previously subject (from unobstructed aquatic habitat to a berm and armored stream bank), and in the process, impaired the flow or circulation or reduced the reach of the creek, then a permit would still have been required for Respondents' discharge activity under Section 404(f)(2). Frankly, it is EPA's position that it need not even reach the issue of the applicability of the recapture provision in Section 404(f)(2) because the CWA 404(f)(1) exemptions simply do not apply to Respondents' November 2002 discharge activities as discussed in detail below.

There have been multiple guidance documents issued by EPA and the Corps describing the CWA 404(f)(1) agricultural exemption and the 404(f)(2) recapture provision. As a courtesy, I have enclosed some of these documents with the hard copy of this letter.<sup>1</sup> It is clear from the case law and

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<sup>1</sup> I have enclosed the following documents: 1) EPA Memorandum *Issues Concerning the Interpretation of 404(f) of the Clean Water Act*, February 8, 1985; 2) EPA/Corps Memorandum for Field *Clean Water Act Section 404 Regulatory Program and Agricultural Activities*, May 3, 1990; 3) EPA Wetlands Fact Sheet #19 *Agriculture and Wetlands* and Fact Sheet #20 *Clean Water Act 404(f) Exemptions*, March 1993; 4) Corps Regulatory Guidance Letter *Clarification of the Phrase "Normal Circumstances" as it pertains to Cropped Wetlands*, December 31, 1993;

5) USDA NRCS Memo *Prior Converted Cropland and Clean Water Act Jurisdiction*, October 23, 1997. There are a number of other resources that may help you in understanding the CWA 404(f)(1) exemptions and the 404(f)(2) recapture provision. One such resource is the *Wetlands Deskbook 2<sup>nd</sup> Edition*, ELR 1997 which was written by Margaret Strand, formerly the Chief of the Environmental Defense Section of the U.S. Department of Justice which is the section that handles CWA 404 enforcement cases. Another resource is the *Law of Wetlands Regulation*,

the legislative history of the Clean Water Act, that the CWA 404(f) exemptions are meant to be narrowly construed, including the exemption for normal farming activities found in CWA 404(f)(1)(A). See, e.g. *U.S. v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir. 1985); *U.S. v. Akers*, 785 F.2d. 814, 819 (9<sup>th</sup> Cir. 1986); 3 A Legislative History of the Clean Water Act of 1977, 95<sup>th</sup> Cong., 2d Sess., Ser. No.95-14 (1978), at 474.

#### *Prior Converted Cropland*

You indicated during our December meeting and in your January 27, 2003 letter, that the area at issue is a “prior converted wetland” and if needed, you could obtain a written confirmation of that fact from the Soil Conservation Service currently known as the Natural Resource Conservation Service (NRCS). I am unfamiliar with the term “prior converted wetland,” however, EPA and the Corps have exempted “prior converted cropland” as that term is defined by the National Food Security Act Manual (NFSAM) from the definition of “waters of the United States.” 33 C.F.R. § 328.3(a)(8); 40 C.F.R. 232.2; 58 *Fed. Reg.* 45008 (September 15, 1993). NRCS has defined prior converted cropland in Part 514.31 of the NFSAM 3<sup>rd</sup> Edition as being “wetlands that were drained, dredged, filled, leveled, or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, for the purpose of, or to have the effect of, making the production of an agricultural commodity possible, and an agricultural commodity was produced at least once *prior to* December 23, 1985.” Part 514.31b of the NFSAM indicates that a wetland cannot be labeled as a prior converted (PC) cropland as a part of a PC determination, if the area meets the “farmed wetland” criteria contained in Part 514.22 (by exhibiting certain wetland hydrology criteria), or if it has been “abandoned” according to Subpart 514.25 (cropping, forage production or management has ceased for 5 successive years and the land meets wetland criteria).

To avoid any misunderstanding about which specific areas of the Bridgeview Vineyards property were converted to agricultural use prior to 1985, EPA requests that you obtain written confirmation of a PC determination from NRCS and provide the PC determination to EPA as quickly as possible. Please be aware, however, that even if some areas of the Bridgeview Vineyards property have been determined to be PC, a PC exemption by definition applies to wetlands not to rivers, streams, or tributaries. See, *U.S. v. Appel*, 42 ERC 1822 (C.D. Cal., February 2, 1996). Sucker Creek is not a “wetland” but is a tributary to the East Fork of the Illinois River. It is therefore not a prior converted cropland that is exempted from the definition of “waters of the United States.”

#### *CWA 404(f)(1)(A) exemptions*

As for the applicability of the CWA 404(f)(1)(A) exemptions, discharges associated with

normal farming, silviculture, and ranching activities are exempt only if the activity falls within one of the activities specifically listed and defined in the statute and the regulations (plowing, seeding, cultivating, harvesting, minor drainage, and upland soil and water conservation practices). There appears to be no dispute that Respondents' discharge activities did not involve plowing, seeding, cultivating, harvesting, or minor drainage as defined in 33 C.F.R.

§ 323.4(a)(1) and in 40 C.F.R. § 232.3(c) and (d). However, during our meeting in December, Eric Tenbrook stated that Respondents' activities could be classified as "upland soil and water conservation practices."

Neither Corps nor EPA regulations define the term "upland soil and water conservation practices," but it is clear from reading the legislative history of the 1977 CWA Amendments that upland soil and water conservation practices refers to conservation activities that are performed on uplands and involve non-point source discharges. See, 3 A Legislative History of the Clean Water Act of 1977, 95<sup>th</sup> Cong., 2d Sess., Ser. No.95-14 (1978), at 420 ("These exemptions clarify that the activities that do not involve point source discharges are exempt as well as specifically listed activities that may involve minor discharges that will be controlled by best management practices. The conferees have clarified that plowing, seeding, cultivating, harvesting, minor drainage and soil and water conservation practices performed on uplands were not intended to require 404 permits."); at 474 ("The conferees agreed to adopt the Senate amendment that legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material and will be adequately controlled by best management practices and performance standards. The conferees have adopted the Senate's explicit approach for clarifying that plowing, seeding, cultivating, harvesting, minor drainage and soil and water conservation practices performed on uplands were not intended to require section 404 permits."); at 524 (First, the conference bill clarifies the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing, seeding, cultivating, harvesting, and upland conservation and minor drainage practices."); and at 529 ("The amendment clarifies that normal farming, ranching and silvicultural activities such as plowing, seeding, cultivating, and harvesting, as well as minor drainage and soil and water conservation practices performed on uplands, were not intended to require 404 permits."). That Congress intended that upland soil and water conservation practices relates to non-point source discharges on uplands is further evidenced by references in the legislative history to discussions of simultaneous amendments being made to section 208 of the CWA (areawide waste treatment management). See *Id.* at 486 and 524.

Under the exemption, upland soil and water conservation practices are activities related to normal farming, ranching or silvicultural activities. See, U.S. v. Zanger, 767 F. Supp. 1030, 1035 (N.D. Cal. 1991); EPA Wetlands Fact Sheet #20. A further indication of what upland soil and conservation practices means can be discerned from the definition of "minor drainage" in EPA and Corps regulations which include discharges to connect "upland drainage facilities" to waters of the United States to effect the removal of excess water from upland crops. 40 C.F.R.

§ 232.3(d)(3)(i)(A); 33 C.F.R. § 323.4(a)(1)(iii)(C)(1)(i). These same regulations refer to the “construction and maintenance of upland (dryland) facilities, such as ditching and tilling, incidental to the planting, cultivating, protecting, or harvesting of crops...”

It is clear from Mr. Kerivan’s statements in his December 6, 2002 letter to Elbert Moore, and from the NOAA and EPA inspectors’ observations at the site, that the work conducted at Sucker Creek was not done in upland areas only. It is also clear that the work was not conducted for purposes of removing excess water from upland crops nor was it incidental to planting, cultivating, protecting, or harvesting of upland crops. Bank stabilization and erosion control are not activities that relate specifically to farming, ranching or silvicultural activities, but are concerns for anyone who owns property along an active water body. For all of these reasons, Respondents’ discharge activities are not exempted as an upland soil and water conservation measure under CWA Section 404(f)(1)(A) and its implementing regulations.

#### *CWA 404(f)(1)(B) exemption*

During our December 17<sup>th</sup> meeting and in your letter dated January 27<sup>th</sup>, you indicated that Respondents’ discharge activities should qualify as maintenance and repair under, 33 U.S.C. § 1344(f)(1) [CWA Section 404(f)(1)] . CWA Section 404(f)(1)(B) exempts the discharge of dredged or fill material “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures...” However, in their regulations at 40 C.F.R. § 232.3(c)(2) and 33 C.F.R. § 323.4(a)(2), EPA and the Corps clarify that such maintenance does not include any modification that changes the character, scope, or size of the original fill design. The regulations further state that emergency reconstruction must occur within a reasonable period of time after damage occurs to qualify for the exemption. Based upon our discussions and the inspections conducted at the site, it is apparent that Respondents’ discharges far exceeded the size of any historic riprap that was placed on site that could be considered as “grandfathered in.” It is also apparent that the “damage” warranting the emergency reconstruction occurred years before the work was conducted in November 2002. Therefore, Respondents’ activities would not be exempt under CWA Section 404(f)(1)(B) and its implementing regulations.

As you are no doubt aware, dischargers claiming an exemption under CWA 404(f) bear the burden of proving that their activities are exempt from regulation. U.S. v. Brace, 41 F.3d 117, 124 (3d Cir. 1994), U.S. v. Akers, 785 F.2d. 814, 819 (9<sup>th</sup> Cir. 1986) Thus far, Respondents have presented no proof that their discharge activities are exempted from CWA jurisdiction under CWA 404(f)(1) and even if exempted, are not otherwise recaptured under CWA 404(f)(2). As indicated above, EPA believes that the CWA 404(f) exemptions do not apply to Respondents’ November 2002 discharges and do not excuse Respondents’ failure to obtain the required CWA 404 permit before

undertaking such activity.

I trust that this letter adequately responds to your questions concerning EPA's authority to issue and enforce the compliance order issued to Respondents. While EPA understands Respondents' concern about erosion at the Brideview Vineyard's property, the mechanism for addressing that concern was (and still is) through the CWA 404 permitting process, through which an appropriate project design and a plan to minimize impact to listed species can be properly considered.

Please contact me at 206-553-1810, if you have any questions concerning EPA's response to your proposed timetable or if you have any other questions concerning this matter. EPA looks forward to receiving the NRCS PC determination from you as soon as possible. We also expect to receive your proposed restoration plan by March 31, 2003.

Sincerely,

Deborah E. Hilsman  
Assistant Regional Counsel

cc: Yvonne Vallette, EPA OOO  
Jim Houseman, NOAA Fisheries  
Steve Springer, NOAA Fisheries  
Niel Moeller, NOAA